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# The Law of Nations and the Judicial Branch

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# The Law of Nations and the Judicial Branch

THOMAS H. LEE\*

*This Article explains what the law of nations meant at the time the United States was established and how it interacted with the original U.S. Constitution. The “law of nations” was not only a historical term for modern customary international law, it (1) was sometimes a broad term for all international law, including conventions or treaties—the “conventional” law of nations; (2) included principles of domestic law perceived to be shared by all civilized nations; (3) was a source of the U.S. law of federalism, given the early American view that the states retained residual sovereignty beyond what was conferred on the new general government by the Constitution; and (4) was perceived in part as unwritten natural law. The Americans who adopted the Constitution were keenly aware of their place in the world as a militarily weak new state in need of peace and trade with the European powers for survival, and thus eager to comply with the law of nations—the intramural rules of the European world order. They recognized that the judicial branch could play an important role in advancing the new nation’s international acceptance and survival by judicious deployment of the law of nations as an instrument of U.S. foreign policy, which is why eight of the nine constitutional grants of judicial power in Article III implicated the law of nations. The law of nations was the original federal common law.*

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## INTRODUCTION

Professors Anthony J. Bellia and Bradford R. Clark have written a valuable book unfolding a new theory of how the law of nations interacts with the U.S. Constitution.<sup>1</sup> *The Law of Nations and the United States Constitution* questions the facile presumption that modern customary international law is synonymous with the traditional law of nations and exposes the fallacy that the law of nations is a simple construct. Bellia and Clark offer, instead, a tripartite categorization of its principal fields: the law merchant, the law maritime, and the law of state-state relations.<sup>2</sup>

Their book reminds us of the importance of engaging history and of understanding the role that the law of nations played in the original U.S. constitutional order. But, at the end of the day, Bellia and Clark's historical analysis suffers from an undue focus on present controversies about whether modern customary international law—most prominently, human rights law—is federal law, and about the role of the federal courts in foreign affairs. Bellia and Clark essentially end up on the “no” side of the “modern customary international law as federal law” debate, with the exception of what they call the law of state-state relations. They argue that this traditional law of nations, anchored in respect for the sovereignty of a nation-state within its borders, logically trumps any claim that an act by the United States or any other nation-state has violated human rights protected under modern customary international law. The consequence is that federal courts should dismiss lawsuits alleging such human-rights claims rather than decide them on the merits. Bellia and Clark assert, as a general matter, that the original constitutional plan entailed judicial passivity in foreign relations because the Constitution exclusively grants the political branches all foreign relations powers.<sup>3</sup>

My two aims in this Article are to draw a more complete picture of the historical understanding of the law of nations at the Founding and to show how the Constitution as originally framed envisioned an affirmative role for the judiciary in U.S. foreign policy. Framing the central inquiry as whether the law of nations was federal law or state law makes historical findings more portable to modern contexts, but it is not faithful to the original context. Late eighteenth-century American lawyers and judges did not perceive sharp distinctions between the laws of separate sovereigns, having trained and practiced at a time when law was perceived to be a universal discipline with general principles applicable to all civilized nations. Bellia and Clark have performed a valuable service by expanding our understanding of the diversity of the law of nations, but the law of nations

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1. ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017).

2. *Id.* at xiii.

3. See BELLIA & CLARK, *supra* note 1, at 270 (“by giving the political branches exclusive authority over the accepted means of pursuing redress against foreign nations, the Constitution authorized the political branches exclusively to decide whether, when, and how the United States would pursue redress against foreign nations for their misconduct”).

was far more nuanced than their tripartite subject-matter characterization presumes. And, in contrast to Bellia and Clark's tale of judicial passivity in foreign relations at the time of the Constitution's adoption, I will tell an originalist story of constitutionally-authorized judicial activism in foreign affairs.

The written Constitution and its adopters designed the judicial branch to play a dynamic role in the conduct of the United States' foreign policy, not merely to follow the political branches' lead. And the federal courts in fact played this role in the first decades of the new Republic. Because the United States was a new and weak state desirous of commerce and peace with the European powers but fearful of their intervention in the Americas, the federal courts typically exercised restraint and were deferential to the sovereignty of foreign states. Ascertaining and applying the law of nations, most significantly the law of maritime warfare, was the medium by which the judiciary branch was to play its essential foreign relations role. The law of nations was the original federal common law. By this I mean that the law of nations was to be the default source of rules of decision for federal courts to apply in cases and controversies before them "except where the constitution, treaties or statutes of the United States otherwise require or provide," pursuant to parts of all nine grants of judicial power in Article III and its original implementing legislation—the First Judiciary Act of 1789.<sup>4</sup> And this was regardless of what state legislatures or state courts might have to say about the cases and controversies in question.

This Article proceeds in four Parts. Part I briefly describes Bellia and Clark's argument. Part II provides a fuller description of the "law of nations" as it was perceived in the late eighteenth century. Specifically, it sets out four dimensions of the late eighteenth-century conception of the law of nations missing from Bellia and Clark's account. Part III describes Article III's grants of judicial power and examines how these grants empowered the federal courts to decide cases using rules drawn from the law of nations. It also describes how the First Congress selectively implemented these constitutional grants in the Judiciary Act of 1789. Part IV asserts that the respect for nation-state sovereignty that Bellia and Clark attribute to the state-state relations branch of the law of nations is the manifestation of a deeper political principle—the commitment of a new, militarily weak revolutionary republic to autonomous self-government and reciprocal non-intervention by the European great powers. The right of such a new state to be treated as an equal sovereign and thus to be left alone by the powerful European monarchies—most importantly Great Britain—was the foundation stone of the new Republic and its constitutional order with respect to foreign relations. It is this original geopolitical context—inapplicable to the United States today as the leading world power—and not the law of state-state relations—that explains the special regard for sovereign autonomy in the U.S. constitutional order, not the traditional law of state-state relations. In fact, the law of

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4. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1333 (2012)).

state-state relations has itself evolved over the intervening centuries. It no longer adheres to the organizing principle that the sovereign state is the only actor on the international plane, most importantly by recognizing the validity of international human rights claims against such states. Accordingly, Bellia and Clark's presumption that the law of state-state relations today is essentially the same as it was in 1787 is misleading. A brief conclusion offers modern takeaways from the historical understanding sketched in this Article.

### I. BELLIA AND CLARK ON THE LAW OF NATIONS

The primary insight of *The Law of Nations and the United States Constitution* is that the law of nations comprises three different bodies of law: the law merchant, the law maritime, and the law of state-state relations.<sup>5</sup> The law merchant is the general commercial law associated with the U.S. Supreme Court's 1842 decision in *Swift v. Tyson*.<sup>6</sup> This body of law included rules about when and how cross-border commercial contracts were formed and satisfied, such as proofs of debt and methods of acceptable payment.<sup>7</sup> A century later, in *Erie Railroad Co. v. Tompkins*, the Court famously disavowed the law merchant as a source of rules of decision in citizen-on-citizen diversity suits in federal court.<sup>8</sup> The second branch of the law of nations—the law maritime—encompasses the extinct law of prize (adjudication of title to ships and cargoes seized in wartime) and the extant law of admiralty (the law of peacetime transport and casualties on navigable waters).<sup>9</sup> Under the century-old decision in *Southern Pacific Co. v. Jensen*,<sup>10</sup> federal courts still retain judicial power to decide admiralty and maritime cases

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5. See BELLIA & CLARK, *supra* note 1, at xiii (defining “the law merchant, the law of state-state relations, and the law maritime” as “the three traditional branches of the law of nations” at the time of the Constitution’s adoption).

6. 41 U.S. (16 Pet.) 1 (1842); see BELLIA & CLARK, *supra* note 1, at 29–32.

7. See, e.g., *Swift*, 41 U.S. at 19–20; see also BELLIA & CLARK, *supra* note 1, at 26–32.

8. 304 U.S. 64, 74–80 (1938) (holding, in part, that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State,” which is “not a matter of federal concern” but rather “shall be declared by [the State’s] Legislature in a statute or by its highest court in a decision”); see also BELLIA & CLARK, *supra* note 1, at 132 (“Originally, federal courts applied the law merchant as general law in the exercise of their diversity jurisdiction, subject to any alterations or displacement by local state law. Once states abandoned judicial application of general law such as the law merchant in favor of local state law, *Erie* eventually interpreted the Constitution to require federal courts to apply state law in the absence of an applicable provision of the Constitution or a federal statute.”).

9. See BELLIA & CLARK, *supra* note 1, at 113–34. Bellia and Clark assert:

The law maritime encompassed both public matters governed by the law of state-state relations (such as prize cases) and private transactions governed by general maritime law (such as maritime commerce)[.] . . . [and] provided a body of general law comparable to—and sometimes overlapping with—the law merchant for cases within the jurisdiction of admiralty courts. As Justice Joseph Story explained, admiralty jurisdiction was ‘divisible into two great branches, one embracing captures, and questions of prize, arising jure belli; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations.’

*Id.* at 113–14.

10. 244 U.S. 205 (1917).

based on general principles of maritime law, now mostly framed in Supreme Court precedents, even if contrary to applicable state law.<sup>11</sup> The third branch of the law of nations—the law of state-state relations—defines duties and obligations among sovereign states.<sup>12</sup> Bellia and Clark assert that “the Constitution was designed to interact in distinct ways with each of the three traditional branches of the law of nations that existed when it was adopted.”<sup>13</sup>

The three branches of the law of nations that Bellia and Clark theorize are not created equal in their account:<sup>14</sup> the law of state-state relations is paramount.<sup>15</sup> First, they assert, the law of state-state relations is an important interpretive tool because it helps to explain the original meanings of many of the foreign relations provisions in the Constitution.<sup>16</sup> For instance, the law of state-state relations generated the list of war powers in Article I, Section 8: “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>17</sup> To understand what “Letters of Marque and Reprisal” are, we must look to the law-of-nation treatise writers consulted by early Americans; the two most prominent such writers were William Blackstone and Emer de Vattel.<sup>18</sup> Likewise, it is the law of state-state relations, again as set forth in eighteenth-century

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11. 244 U.S. 205, 215 (1917) (“Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . . And . . . in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.”) (citations omitted); *see also* BELLIA & CLARK, *supra* note 1, at 128–31 (analyzing the Court’s decision in *Jensen*, including the precedential effect of its holding “that general maritime law operates as preemptive federal law in some instances because Article III’s admiralty and maritime jurisdiction incorporates it as federal law”).

12. *See* BELLIA & CLARK, *supra* note 1, at 73–112 (discussing the evolution and historical applications of the law of state–state relations protecting nations’ “territorial sovereignty” with “limited exceptions”).

13. *Id.* at xiii.

14. *See, e.g., id.* at 131 (explaining that the law maritime is the only of the three branches “that the Supreme Court has found to be incorporated as federal law by an Article III jurisdictional grant”).

15. *See id.* at 269 (“For the Founders, the most important branch of the law of nations to the collective interests of the United States was the law of state-state relations.”).

16. *See id.* at 50 (“It is not possible to understand [the Article I and Article II grants of foreign relations] powers—let alone determine their effect—without consulting background principles of the law of nations against which they were drafted and ratified.”). *See generally* MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007) (explaining the “interpretive power” of the law of nations in the realm of international affairs).

17. U.S. CONST. art. I, § 8, cl. 11.

18. *See generally* 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*67 (Oxford, Clarendon Press 1769); EMMERICH DE VATTEL, 3 *THE LAW OF NATIONS in NATURAL LAW AND ENLIGHTENMENT CLASSICS* 1 (Béla Kaposy & Richard Whatmore eds., Thomas Nugent trans., 2008) (1758).

Blackstone’s *Commentaries* and Vattel’s *Law of Nations* were the first two books the Senate bought for its library in 1794. 4 ANNALS OF CONG. 65 (1794) (“Ordered, That the Secretary purchase Blackstone’s *Commentaries*, and Vattel’s *Law of Nature and Nations*, for the use of the Senate.”). Vattel’s book was a monograph focused exclusively on the law of nations. Blackstone’s four-volume treatise covered all of English law, and included a brief but highly-influential discussion of the law of nations in Volume 4. On the influence of Blackstone, *see* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 738–47 (1976). On Vattel’s importance to early American statesmen and jurists, *see* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1061–67 (2002).

treatises, that illuminates distinctions between similar constitutional words like “Treaties”<sup>19</sup> and “Agreement or Compact,”<sup>20</sup> and as among “Ambassadors, other public Ministers and Consuls.”<sup>21</sup> The law merchant and maritime law do not have the same dictionary leverage in constitutional interpretation, except that the latter helps to ascertain the scope of the national “judicial Power,”<sup>22</sup> that extends “to all Cases of admiralty and maritime Jurisdiction.”<sup>23</sup>

Second, the law of state-state relations, according to Bellia and Clark, is the only one of the three fields of the traditional law of nations that survives as federal judge-made law binding on the states in a significant way.<sup>24</sup> True, the peacetime enclave of maritime law persists because of *Jensen*, despite its tension with the holding in *Erie*.<sup>25</sup> But the enactment of federal statutes has dramatically narrowed federal judicial power to make law for the seas, which in turn, has declined in significance following the transformations in transportation technology since the age of sail which have rendered maritime transport more reliable and secure. By contrast, given increasing globalization, the law of state-state relations arises in federal courts in greater and more diverse contexts whenever the laws, judgments, or acts of foreign states or officials are implicated in a suit in federal court.<sup>26</sup> The paradigmatic example of this branch of the law of nations is the act of state doctrine, which requires federal courts to abstain from passing on the legality of the acts of foreign sovereigns within their jurisdictions, regardless whether state law would permit a U.S. court to do so.<sup>27</sup> Bellia and Clark make a general claim that, like the act of state doctrine, “[l]ong-standing Supreme Court precedent supports the proposition that courts must uphold the traditional rights of foreign sovereigns under the law of state-state relations against the conflicting demands of state law.”<sup>28</sup>

Bellia and Clark’s historical account draws more modest missions of restraint and abstention for the judicial branch vis-à-vis the national political branches in matters touching upon U.S. foreign policy and relations. The Constitution grants to Congress and the President the powers to recognize foreign nations, wage war,

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19. U.S. CONST. art. II, § 2, cl. 2; *id.* art. VI, cl. 2.

20. *Id.* art. I, § 10, cl. 3.

21. *Id.* art. II, § 2, cl. 2.

22. *Id.* art. III, § 1.

23. *Id.* art. III, § 2, cl. 1.

24. See BELLIA & CLARK, *supra* note 1, at 272 (“[T]he Constitution’s exclusive allocation of specific foreign relations powers to the political branches preempts state law that would deny foreign nations their traditional rights under the law of state-state relations.”).

25. *Cf. id.* at 115, 128–29 (describing the Court’s “contrast[ing]” holdings in *Erie* and *Jensen*).

26. See, e.g., *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (reversing Second Circuit’s interpretation of Federal Rule of Civil Procedure 44.1 to require binding deference to Chinese government regarding Chinese law in an *amicus* brief filed in federal district court urging reversal of a jury verdict against Chinese vitamin-C manufacturers for violating the Sherman Act).

27. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”).

28. BELLIA & CLARK, *supra* note 1, at 245.



regulate commerce, and conduct diplomatic relations with foreign sovereigns.<sup>29</sup> Accordingly, Bellia and Clark assert that “judicial respect for the rights of recognized foreign states under the law of nations has served to uphold recognition of foreign nations and governments by the political branches.”<sup>30</sup> This insight enables a neat and logical rejoinder to advocates’ efforts to vindicate customary international law-based human rights claims in U.S. federal courts. If the courts did pass on the legality of foreign sovereign acts and afford remedies to private litigants, they would transgress on “the political branches[’] exclusive authority over the accepted means of pursuing redress against foreign nations.”<sup>31</sup> In other words, Bellia and Clark argue that the traditional law of nations field of state-state relations, grounded in the principle that one sovereign may not challenge what another sovereign does within its borders and committed to the political branches under the Constitution, trumps the customary international law of human rights of more recent vintage.

In this way, Bellia and Clark fashion a new history-based contribution to current debates about the status and role of customary international law and how federal courts should respond when they encounter it. The majority view among U.S. foreign relations scholars is that modern customary international law is always federal law, entitled to Supremacy Clause effect on par with the Constitution, treaties, and congressional statutes, and therefore binding on the states.<sup>32</sup> As support for their position, these scholars invoke iconic historical statements of the Supreme Court, statesmen, and jurists, that proclaim the law of nations as the law of the United States.<sup>33</sup> The most famous of these is Justice Horace Gray’s ringing endorsement in *The Paquete Habana*: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>34</sup>

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29. See *id.* at xix–xxii. Bellia and Clark do not take a position on how separation-of-powers disputes between these two political branches should be resolved. See *id.* at 232 (“We do not attempt to determine the precise allocation of war and foreign relations powers between Congress and the President”).

30. *Id.* at 73.

31. *Id.* at 270.

32. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–27 (1998) (defending the position that customary international law is federal law in response to Professors Bradley and Goldsmith’s article, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997)).

33. See generally, Koh, *supra* note 32, at 1830–41 (discussing the “history and doctrine,” including Supreme Court precedent, “invoke[d]” in one such scholarly account).

34. 175 U.S. 677, 700 (1900). Bellia and Clark correctly point out that Gray’s statement involved the now-extinct field of maritime prize law, over which the federal courts had exclusive jurisdiction and where it was widely accepted that federal judge-made law displaced all state laws. See BELLIA & CLARK, *supra* note 1, at 145 & n.20, 163–64, 218–19. Blackstone’s remark in his *Commentaries* is as often cited as canonical support for the view that the law of nations was part of England’s common law: “the law of nations . . . is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land.” 4 BLACKSTONE, *supra* note 18, at \*67; see also William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559 (2018).



More recently, scholars seeking to revise the majority view have asserted that customary international law is not presumptively federal law that preempts state law.<sup>35</sup> These revisionists dismiss historical statements, including such statements affirming the law of nations as the law of the United States, as artifacts of a bygone era, retired by the iconic *Erie* decision. They conclude that modern customary international law warrants no recognition as federal law in any circumstance, whether as a hook for obtaining federal court jurisdiction or as an independent body of law generating rules of decision that preempt contrary state law.<sup>36</sup> A third group of scholars takes the middle ground and asserts that customary international law is non-binding general law analogous to the law merchant.<sup>37</sup>

Bellia and Clark's thesis that the law of nations operated differently across their three designated subject matters eschews the all-or-nothing approach of both the majority who claim that customary international law is *always* federal law, and the revisionists who claim that it is not. According to Bellia and Clark, the enduring law of state-state relations is still federal law that preempts state law, but "[m]odern customary international law represents a new and distinct branch of international law."<sup>38</sup> They assert that federal courts should not view this new customary international law, most prominently human rights norms outside of U.S. ratified treaties, as preemptive federal law because to do so with encroach upon the traditional law of state-state relations entrusted to the political branches.

Their argument is novel, but its takeaway approximates the revisionists' conclusion: federal judges should leave diplomacy and foreign affairs to the national political branches and abstain from recognizing individual-rights claims under customary international law as federal law. Bellia and Clark depart from the revisionists on one prescription: their acceptance of the displacement of state law in the traditional law-of-nations field of state-state relations. "The Constitution's allocation of powers—understood in historical context and as applied by the Supreme Court in practice—requires U.S. courts to apply some rules of customary international law to preempt state law."<sup>39</sup> But this point of difference, ironically, makes them even more hostile than the revisionists to the modern customary international law of human rights. This is because their thesis gives U.S. courts a federal law basis—namely, the law of state-state relations—for

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35. See generally Bradley & Goldsmith, *supra* note 32 ("We have argued that, in the absence of federal political branch authorization, [customary international law (CIL)] is not a source of federal law. Certain doctrinal consequences follow from this argument. First, as a general matter, a case arising under CIL would not by that fact alone establish federal question jurisdiction. Second, federal court interpretations of CIL would not be binding on the federal political branches or the states."); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 716–21, 717 n.185 (1986) (arguing against "judicial application of customary international law" due to "the incompatibility of the process of [its] formation with American political philosophy").

36. See Trimble, *supra* note 35, at 678–84.

37. See, e.g., Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 369–70 (2002).

38. BELLIA & CLARK, *supra* note 1, at 166.

39. *Id.* at 268 (emphasis removed).

declining to entertain such human rights claims, even when they are framed as state-law claims<sup>40</sup> or as customary international law presented as state-law claims in accordance with Bradley and Goldsmith's revisionist understanding. And this would be true in state or in federal court, because the federal law of state-state relations would be binding on state judges, too.<sup>41</sup>

## II. WHAT WAS THE LAW OF NATIONS

Bellia and Clark's division of the law of nations into three branches is bold and new, but I am not so sure it is right. To start with, their tripartite characterization of the law of nations was not used near the time of the Founding; rather, the most common subject-matter division in the law of nations at that time was between the laws of war and the laws of peace.<sup>42</sup> Nevertheless, their scheme has a certain appeal because it corresponds roughly to the subject matter of many cases on the dockets of the early federal courts—admiralty, commercial law, and prize law. Interestingly, the very branch of the law of nations that Bellia and Clark emphasize—the law of state-state relations—came up most frequently in prize cases during the United States' first century. Prize law was the wartime branch of maritime law, just as admiralty law was its peacetime half. Bellia and Clark frame prize cases as “part of the larger law of state-state relations,” citing Blackstone.<sup>43</sup> But Blackstone does not refer to “disputes relating to prizes, to shipwrecks, to hostages, and ransom bills”<sup>44</sup> as being governed by the law of state-state relations.<sup>45</sup> Indeed, the law of “shipwrecks”—for example, who owns a shipwreck, or what is the reward under the law of salvage for saving cargo from a sinking ship—seems to bear no direct connection to the law of state-state relations. Instead, what Blackstone *does* say about the law that should decide such “disputes relating to prizes” is that “there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.”<sup>46</sup> What this example illustrates is that Blackstone and other Founding-era sources did not perceive Bellia and Clark's distinction among three branches of the law of nations, but instead saw it as one undifferentiated body of rules of decision distilled “from history and usage” and from “generally approved” international scholars.

In my opinion, Bellia and Clark's definition does incomplete justice to the breadth and nuance of the law of nations as understood by Americans at the time

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40. See, e.g., CAL. CIV. PROC. CODE § 354.6 (West 1999) (California statute authorizing redress for victims of foreign slave labor, with an eye to affording redress to victims of Japanese imperial aggression during World War II).

41. Bellia and Clark do not explicitly say that the law of state-state relations is “the law of the United States” under the Supremacy Clause, but that seems to be a logical inference from their argument.

42. See, e.g., HUGO GROTIUS, 1 THE RIGHTS OF WAR AND OF PEACE, *reprinted in* NATURAL LAW AND ENLIGHTENMENT CLASSICS (Richard Tuck ed., 2005) (1625).

43. BELLIA & CLARK, *supra* note 1, at 117 & n.7.

44. *Id.* (quoting 4 BLACKSTONE, *supra* note 18, at \*67).

45. See 4 BLACKSTONE, *supra* note 18, at \*67.

46. *Id.*

of the Constitution's adoption and initial implementation. It is under-inclusive of how the law of nations interacts with the U.S. Constitution in four key respects: the law of nations (1) was sometimes a broad term for all international law, including conventions or treaties—the “conventional” law of nations; (2) included principles of domestic law perceived to be shared by all civilized nations; (3) was a source of the U.S. law of federalism, given the early American view that the states retained residual sovereignty beyond what was conferred on the new general government by the Constitution; and (4) was perceived in part as unwritten natural law.

First, a common usage of “law of nations” in the late eighteenth century was as an umbrella term equivalent to “international law” today. This usage would have included not only customs, but conventions or treaties. Indeed, Vattel referred to treaties as the “conventional law of nations.”<sup>47</sup> Professors Cleveland and Dodge have recently argued that this umbrella meaning of “law of nations” is the proper reading of Article I's grant of power to Congress “[t]o define and punish . . . Offences against the Law of Nations.”<sup>48</sup> Recognizing the possibility of this broader usage is essential to interpreting other Founding-era references to the “law of nations” and, consequently, their relevance and ramifications for the present day.

Second, Bellia and Clark's tripartite subject-matter formulation neglects a subset of the law of nations that was central to early American jurists: principles of law shared by the domestic legal systems of all civilized nations. These principles are still considered one of the three primary sources of international law today, as the Statute of the modern International Court of Justice explicitly states.<sup>49</sup> A “universal” principle was one that *all* sovereigns shared; a “general” principle was one that *most* sovereigns shared.<sup>50</sup> The basic idea was that the legal systems and jurisprudence of all civilized nations shared certain basic principles. Domestic constitutions reflected these principles, but they were not constitutive of them; nor could they destroy them.

Blackstone described this branch of the law of nations with characteristic lucidity:

[T]he law of nations . . . is here adopted in it[s] full extent by the common law . . . . And those acts of parliament . . . made to enforce this universal law, or to facilitate the execution of it[s] decisions, are not to be considered as

47. VATTEL, *supra* note 18, intro., § 24, at 77.

48. U.S. CONST. art. I, § 8, cl. 10; *id.* art. I, § 8, cl. 1, 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”). See generally Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L. J. 2202 (2015).

49. The statute identifies three primary sources of international law for the International Court of Justice to apply: treaties; “international custom, as evidence of a general practice accepted as law;” and “the general principles of law recognized by civilized nations.” Statute of the International Court of Justice art. 38, ¶ 1.

50. See, e.g., *Picquet v. Swan*, 19 F. Cas. 609, 612 (C.C.D. Mass. 1828) (No. 11,134).

introductory of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom[,] without which it must cease to be a part of the civilized world.<sup>51</sup>

In his “Law of Nations” entry for the *Encyclopedia Americana*, Justice Joseph Story divided the law of nations into “external” and “internal” halves.<sup>52</sup> His external law of nations corresponded roughly to Bellia and Clark’s three subject matters, especially the law of state-to-state relations.<sup>53</sup> The internal law of nations, Story reasoned, was synonymous with the “public law of the state.”<sup>54</sup> This branch of the law of nations included two types of enacted positive laws (laws “from positive institution”) and laws arising from “the principles of natural justice”<sup>55</sup>—comprising Story’s formulation of the general principles of domestic law shared by civilized nations.<sup>56</sup> This is what Blackstone had earlier referred to as the “universal law” that was incorporated into the common law ensuring that England was “a part of the civilized world.”<sup>57</sup>

It is difficult to convey just how important the “general principles of domestic law” branch of the law of nations was to American constitutionalism in its first century. A famous example may suffice to make the point. The doctrine of national constitutional limits on “personal jurisdiction” in state courts now makes its home in the Due Process Clause of the Fourteenth Amendment, but that was not the legal basis of the iconic decision that created the doctrine.<sup>58</sup> The constitutional holding in *Pennoy v. Neff* was based on general principles of the law of nations.<sup>59</sup> The question in *Pennoy* was whether an Oregon court could enforce a judgment against a nonresident when the plaintiff did not serve process on the defendant in Oregon or attach the defendant’s property in Oregon before bringing

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51. 4 BLACKSTONE, *supra* note 18, at \*67.

52. See Joseph Story, *Law of Nations*, in 9 ENCYCLOPEDIA AMERICANA 141–49 (Francis Lieber ed., Phila., Thomas, Coperthwait & Co. 1838); see also *id.* at 141 (“It would be . . . correct . . . to divide [the law of nations] into two great leading heads, namely, the *internal law of nations*, or that which arises from the relations between the sovereign and the people, and the *external law of nations*, or that which arises from the relations between different nations.”).

53. *Cf. id.* (defining the external law of nations as synonymous with “*international law*” and “divisible into two heads, the one which regulates the rights, intercourse and obligations of nations, as such, with each other; the other, which regulates the rights and obligations more immediately belonging to their respective subjects,” with “[t]he former . . . frequently denominated the *public law of nations*, and the latter the *private law of nations*”).

54. *Id.* at 141 (emphasis removed).

55. *Id.*

56. *Id.*

57. 4 BLACKSTONE, *supra* note 18, at \*67.

58. U.S. CONST. amd. XIV. The state court judgment at issue in *Pennoy v. Neff*, 95 U.S. 714 (1878), had been rendered in February 1866, *id.* at 719, more than two years before the ratification of the Fourteenth Amendment in July 1868. *Id.* at 733 (“Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”).

59. See *id.*

suit.<sup>60</sup> Justice Stephen Field's opinion for the Court held that it could not: "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power."<sup>61</sup> Justice Field described this as "a principle of general, if not universal, law."<sup>62</sup> This principle was actually:

[T]wo well-established principles of public law respecting the jurisdiction of an independent State over persons and property. . . . One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.<sup>63</sup>

In support of these principles, Field cited two authorities: Joseph Story's treatise on the conflict of laws and Henry Wheaton's treatise on international law.<sup>64</sup> It is worth pausing to consider the magnitude of what the majority's decision stands for in terms of constitutional decisionmaking by the Supreme Court at the time. The Supreme Court's decision in *Pennoy* was based not on any constitutional text, hypothesized original meaning, prior Supreme Court precedent, or historical practice. A landmark constitutional holding was justified exclusively on the basis of general principles of the law of nations as derived from leading treatises.

Finding *general principles of domestic law among civilized nations* from the "internal" branch of the law of nations as set out by treatise-writers was a vital conduit for interaction between the law of nations and the U.S. Constitution in the eighteenth and nineteenth centuries, yet it is entirely absent from Bellia and Clark's analysis. The reason for the lacuna, in my view, is that Bellia and Clark focus exclusively on customary international law when looking to the historical law of nations. American lawyers today tend to bifurcate international law into only treaties and customs, ignoring the existence of general principles despite their standing as a third primary source of international law even today.<sup>65</sup> But acknowledging that the traditional law of nations included a concept of best practices among civilized nations is necessary to uncover an accurate understanding of the significance of the law of nations for the U.S. Constitution from the Founding to the end of the nineteenth century.

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60. *Id.* at 715–19.

61. *Id.* at 720.

62. *Id.*

63. *Id.* at 722.

64. *See id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Bos., Hilliard, Gray, & Co. 1834) and HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (Phila., Carey, Lea & Blanchard 1836)).

65. Bellia and Clark, for example, do not identify general principles of law as a category of international law in their book. *See generally* BELLIA & CLARK, *supra* note 1.

Moreover, the documented reliance on the general principles branch of the law of nations for constitutional rulings vis-à-vis the states and citizens in the United States' first century has important potential consequences for today. First, it would seem to support the controversial modern practice of the Supreme Court's turning to customary international law norms and the best practices of other modern jurisprudential systems to interpret the U.S. Constitution.<sup>66</sup> Second, modern international lawyers recognize a subset of international law norms called *jus cogens*—norms that are so fundamental to the community of civilized nations that they cannot be contracted out of by treaty or otherwise shirked by any sovereign state.<sup>67</sup> The most commonly acknowledged *jus cogens* norms are prohibitions against torture, slavery and the slave trade, and genocide.<sup>68</sup>

Given the resemblance between the rationales for the modern *jus cogens* and the traditional logic of the “internal” law of nations, a strong argument might be made that *jus cogens* human rights norms should be treated as binding federal law that preempts contrary state law. Bellia and Clark's law of state-state relations provides no affirmative defense to this argument because eighteenth-century Anglo-American jurists like Blackstone agreed that general principles were principles “without which . . . [a country] must cease to be a part of the civilized world.”<sup>69</sup> Although Bellia and Clark's thesis provides an unsatisfactory rejoinder, I think that they are ultimately right that the U.S. constitutional framework would not permit an international norm of substantive conduct (against slavery, for example) to preempt state law if written federal law (the Constitution, statutes, and treaties) did not independently frame the norm. But, as I will demonstrate in Part III, this is because of a political fact—the nature of the founding American conception of sovereignty—not because of the law of state-state relations, as Bellia and Clark posit.

*Pennoyer* powerfully illustrates not only the second way in which Bellia and Clark's conception of the law of nations is under-inclusive, but also the third way: the law of nations was a source of the federal law of *interstate* relations, not

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66. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“at least from the time of the Court's decision in *Trop* [v. *Dulles*, 356 U.S. 86 (1958)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of ‘cruel and unusual punishments.’”).

67. The Vienna Convention on the Law of Treaties, which the United States has not ratified but which is widely accepted as consistent with customary international law on this point, provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 334 (entered into force Jan. 27, 1980).

68. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW. INST. 1987).

69. 4 BLACKSTONE, *supra* note 18, at \*67.



just international relations.<sup>70</sup> At the Founding, the several United States were each perceived to possess sovereignty analogous to a fully sovereign state, except for the powers ceded to the new national government in the Constitution.<sup>71</sup> Consequently, “the founding generation borrowed from the law of nations to address issues of constitutional federalism (certainly a far more useful compass in this respect than English common law) in their statebuilding project.”<sup>72</sup> By this I mean that early American constitutionalism took rules of the law of nations and applied them directly to interstate relations, not as an analogy or inspiration. *Pennoyer* is again the perfect example. General principles of the internal law of nations not only were used to make a constitutional ruling, but also were applied to decide disputes between American states, not between the United States or its citizens and a foreign state.<sup>73</sup> That is to say, *Pennoyer* can be read not only as an application of the law of nations as a source of universal domestic legal principles, but also as applying the law of state-state relations to interstate relations in a federal system in which the states were viewed as quasi-sovereign. This kind of transposition of the law of state-state relations to the law of U.S. federalism was exceedingly common in the early and young United States.<sup>74</sup>

Fourth and finally, there was a jurisprudential aspect of the law of nations absent in Bellia and Clark’s account that is extinct today but was dominant at the time of the Founding. A part of the law of nations was understood to be the law of nature. Vattel made this explicit in the title of his treatise, “The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns.”<sup>75</sup> Blackstone likewise described the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”<sup>76</sup>

But what did it mean that the law of nations was natural law or natural reason? To answer this question, we begin with what preceded those eighteenth-century jurists. Hugo Grotius is widely viewed as the father of modern international law.<sup>77</sup> In jurisprudential terms, however, he was a transitional figure between medieval and modern. He was transitional because he perceived faith and science as one seamless whole in a way that eighteenth-century thinkers would not. Grotius was both a lawyer and a theologian. He believed that the Christian Bible was the Word of God, and that it was directly relevant to law in practice, not just to

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70. See Lee, *supra* note 18, at 1039 (framing the Eleventh Amendment’s command that the U.S. judicial power “shall not be construed to extend to any suit” against a state by citizens or subjects of foreign states or citizens of other states as manifesting the concept of sovereign equality borrowed from contemporaneous international law).

71. See *id.* at 1050–51.

72. *Id.* at 1031.

73. 95 U.S. 714 (1878).

74. See Lee, *supra* note 18, at 1064–66.

75. VATTEL, *supra* note 18.

76. 4 BLACKSTONE, *supra* note 18, at \*66.

77. See, e.g., HUGO GROTIIUS AND INTERNATIONAL RELATIONS (Hedley Bull, Benedict Kingsbury & Adam Roberts eds., 1990).



standards of moral conduct. It is difficult for the modern mind, much less the modern legal mind, to grasp what this *mentalité* entailed.

Grotius's understanding of the connection between the law of nations and natural law might best be demonstrated by examining what he considered valid forms of proof in the Preliminary Discourse (Prolegomena) to his magnum opus, *On the Law of War and Peace*.<sup>78</sup> Grotius stressed the importance of the Old and New Testaments of the Bible to his proofs of the law of nature: "The Authority of those Books which Men inspired by God, either writ or approved of, I often use."<sup>79</sup> He is referring here to the law of nature as the source of the rules that govern human beings. The law of nations, however, was the law of nature as it governed societies of human beings organized as nations.

This second-order nature of the law of nations entailed a different method of proof in Grotius' view. Histories drawn from Greek and Roman antiquity and from Europe after the fall of the Roman empire were the principal sources of rules, not the Bible or Christian moral writers: "the Law of Nature, as we have already said, is in some Measure proved from [the Bible], but of the Law of Nations there is no other Proof but this."<sup>80</sup> At the same time, the principles of natural law "are manifest and self-evident, almost after the same Manner as those Things are that we perceive with our outward Senses."<sup>81</sup> But, for Grotius, the "Law of Nations" encompassed not only "Inference drawn from the Principles of Nature" but also norms based on "an universal Consent."<sup>82</sup> Grotius described this latter type of the law of nations, which Vattel would call the "voluntary law of nations,"<sup>83</sup> as "that which cannot be deduced from certain Principles by just Consequences, and yet appears to be every where observed, [and which] must owe its rise to a free and arbitrary Will."<sup>84</sup> As Vattel acknowledged, this consensual or voluntary law of nations could, counterintuitively, include rules of conduct that seemed "in their own nature unjust and condemnable" but that all nations are presumed to have consented to "because they cannot oppose them by open force."<sup>85</sup> In other words, a part of the law of nations drawn from the law of nature included some norms that departed from natural justice but were everywhere "observed" or "self evident."

Vattel, whose *Law of Nations* was published in 1758, more than 130 years after Grotius's *The Rights of War and Peace*, shared with Grotius a belief that the law of nations was grounded in natural law. However, Vattel's secular and scientific vision of natural law diverged from Grotius's classical and theological view. Vattel opined: "The law of nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those

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78. See GROTIUS, *supra* note 42.

79. *Id.* at 124.

80. *Id.*

81. *Id.* at 111.

82. *Id.* at 112.

83. VATTEL, *supra* note 18, intro., § 21, at 76.

84. GROTIUS, *supra* note 42, at \*66.

85. VATTEL, *supra* note 18, intro., § 21, at 76.

rights.”<sup>86</sup> For Vattel, the rules of the law of nations were derived solely from empirical observations of how the world worked, not from faith, natural justice, or the received wisdom of antiquity. As Carl Becker memorably put it, Vattel and other eighteenth-century philosophers, “having denatured God . . . deified Nature.”<sup>87</sup> Consequently, Vattel’s proofs focused primarily on contemporary case studies, less frequently on classical ones, and never on biblical sources, by contrast to Grotius.

At the same time, Vattel preserved Grotius’s idea that a core set of the law of nations followed from natural-law principles as distinguished from the conventional law of nations (such as treaties) and the customary law of nations.<sup>88</sup> Just as the conventional law of nations was based on explicit consent, the customary law of nations, Vattel reasoned, was “founded on a tacit consent”—as distinguished from the “universal consent” of the natural-law law of nations—and so was “not obligatory except on those nations who have adopted it.”<sup>89</sup> Because the specific norms agreed to by states in both of these two non-natural-law branches of the law of nations were specific to the terms of the treaty or custom in question, Vattel asserted that a discussion of their “particulars does not belong in a systematic treatise on the law of nations,” which was his project.<sup>90</sup> To summarize, the rules that Vattel described in his book were limited solely to the rules that were ordained by natural law, understood as an empirical science. This basic bifurcation of the law of nations is often missed or misunderstood by modern jurists and commentators like Bellia and Clark whose work acknowledges the heavy reliance of the American Founders on Vattel.

The natural-law mindset of late eighteenth-century jurists exemplified by Vattel produced significant consequences for the interaction between the law of nations and the U.S. Constitution. As a general matter, as noted above, the natural-law part of the law of nations (that which was neither convention nor custom) was perceived as a body of law that could be *discovered* or *found* by empirical observation and applied to decide specific cases, much like the laws of gravity could be applied to specific physics problems. This was not so different, jurisprudentially speaking, from the common law, which is perhaps why Blackstone perceived the law of nations and the common law as integrated: “the law of nations . . . is here adopted in it[s] full extent by the common law.”<sup>91</sup> Under this paradigm, what judges do when they decide cases stands in contrast to what the political branches do when they “make” written laws or treaties. At the same time, it was believed that the outcomes of cases were consistent at a systemic level and could be decided by universal or general principles.<sup>92</sup> This in turn engendered reliance on treatise writers or publicists like Vattel who gathered, analyzed, and organized relevant

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86. VATTEL, *supra* note 18, intro., § 3, at 67.

87. CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 63 (1932).

88. *See* VATTEL, *supra* note 18, intro., §§ 24–25, at 77–78 (emphasis added) (distinguishing law of nations principles including the conventional and the customary laws of nations).

89. *Id.*, intro., § 25, at 77.

90. *Id.*

91. 4 BLACKSTONE, *supra* note 18, at \*67.

92. *See, e.g.,* *Pennoy v. Neff*, 95 U.S. 714, 720 (1878).

case studies, rather than on direct empirical examinations by judges (or juries) to find the applicable rules of the law of nations.<sup>93</sup> As Blackstone put it, “this great universal law” was “collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.”<sup>94</sup>

Second, with specific regard to the U.S. Constitution, conceiving of a significant part of the law of nations as natural law explains some textual ambiguities in the written document. The first ambiguity concerns the Supremacy Clause. One argument that the law of nations—and, accordingly, modern customary international law—is not federal law which preempts state law is anchored in the plain language of the Supremacy Clause. That provision states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>95</sup>

The law of nations is unmentioned. Why? To the extent that the subject was the natural law part of the law of nations, it would not have occurred to early American jurists that state constitutions and laws *could* diverge from natural law, requiring resort to the Supremacy Clause as a tiebreaker. Natural law jurists at the time understood that local customs regarding local activities, business, and property could take diverse, heterogeneous forms, even within one nation, just as Vattel’s conventional and customary law of nations bound no one but those that had explicitly or tacitly consented. But as Blackstone observed, it was believed that the law of nations must be “adopted in it[s] full extent” as the fundamental law of a state (that is, by its constitution and statutes) if it were to be counted as “part of the civilized world,”<sup>96</sup> which the American states surely considered themselves. That takes care of the natural law portion of the law of nations. The conventional law of nations—namely, treaties—is also explicitly mentioned in the Supremacy Clause.<sup>97</sup> And what Vattel called the customary law of nations, at least to the extent that it corresponded to the law of state-state relations, also preempts state law, at least according to Bellia and Clark.<sup>98</sup>

But I wonder if the debate about whether the law of nations preempted state law is overblown. As a practical matter, rules of the law of nations in the late eighteenth-century were found for the most part in treatises, not defined in

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93. As noted above, Justice Field’s majority opinion in *Pennoy* relied on two preeminent nineteenth-century treatise writers, Joseph Story and Henry Wheaton. *See id.* at 722. The authoritative treatises had changed in the intervening century—Blackstone and Vattel were no longer the state of the art—but the method was the same.

94. 4 BLACKSTONE, *supra* note 18, at \*67.

95. U.S. CONST. art. VI, cl. 2.

96. 4 BLACKSTONE, *supra* note 18, at \*67.

97. U.S. CONST. art. VI, cl. 2.

98. *See* BELLIA & CLARK, *supra* note 1, at 44–48.

authoritative legal texts like the Constitution, congressional statutes, and treaties of the United States. Thus, there would have been no felt need for a constitutional provision ordering state judges to privilege federal written legal texts over conflicting state legal texts, because the law of nations did not have an authoritative legal text. And that is the only thing that the express language of the Supremacy Clause purports to do.

The second ambiguity about constitutional text is whether the constitutional words “the Laws of the United States” includes the “law of nations.”<sup>99</sup> Those words arise in two different contexts: in (1) the Supremacy Clause, which, as we have seen, provides that “the Laws of the United States which shall be made in Pursuance” of the Constitution “shall be the supreme Law of the Land;”<sup>100</sup> and (2) Article III, Section 2, which provides that the judicial power “shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>101</sup> With respect to the Supremacy Clause, the use of the word “made” strongly suggests that “Laws of the United States” did not include the law of nations. As discussed above, the natural law part of the law of nations was found or discovered, not made.<sup>102</sup>

The absence of “made” in Article III with respect to “the Laws of the United States” makes that provision a more difficult call. On the one hand, the same language in the Supremacy Clause—“the Laws of the United States which shall be made in Pursuance thereof”—could have been used in Article III without any alteration of meaning, but it was not. Moreover, Supreme Court precedent has tended to construe constitutional “arising under” jurisdiction broadly, on the assumption that Congress does not have to vest all of the constitutional “arising under” judicial power and can limit the terms of its grant by jurisdictional statute.<sup>103</sup> These are two arguments in favor of including the law of nations as part of the “Laws of the United States” in Article III’s specification of arising-under jurisdiction.

On the other hand, the use of the plural form “the Laws of the United States” points in the direction of statutes only, because the singular form—“the Law of the United States”—seems more consistent with an open-ended reading, like the “law of nations.” Moreover, as noted above, the law of nations was understood to be an unwritten body of rules drawn from history, usage, or respected treatise

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99. U.S. CONST. art. VI, cl. 2.

100. *Id.*

101. *Id.* art. III, § 2, cl. 1. Article II, Section 3 separately commands that the President “shall take care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. But that reference seems limited to “Laws” enacted by Congress; regardless, it would be an odd usage to say that the law of nations are “executed.”

102. *Cf.* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 845 (2007).

103. *See, e.g.,* *Osborne v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 764 (1824) (distinguishing between the breadth of Article III judicial power over cases “arising under” federal law and the limited scope of “arising under” jurisdiction pursuant to congressional statutory grant).

writers to decide cases or controversies brought before the federal courts. It seems odd to assert that such a case or controversy was one arising under the rule of decision, rather than in federal court by virtue of party alignment (for example, citizen-citizen diversity) or subject matter (for example, admiralty), or under a written statute or constitutional provision. As a prudential matter, the same ambiguity that makes the phrase “law of nations” so difficult to understand pushes against the conclusion that the use of “the laws of the United States” in a *jurisdictional* provision includes the law of nations. It seems preferable for jurisdictional provisions to be straightforward and easy to police, so as to preclude litigation over non-merits jurisdictional issues. If “Laws of the United States” did include “law of nations,” then there would be more doubt about which cases “aris[e] under” it, by comparison to a construction limited solely to statutes of the United States.

On balance, my view is that the “the Laws of the United States” in Article III probably referred only to statutes, although the cases now suggest it encompasses federal common law.<sup>104</sup> In addition to the points made above in favor of that position, it seems that the only argument against it is the inference of a broader meaning from the absence of the Supremacy Clause phrase “which shall be made in Pursuance thereof.” There is, however, no affirmative evidence that the difference was intended to be meaningful. In that situation, it seems preferable to construe the Article III use of “the Laws of the United States” to align with its use in Article VI.

To summarize Part II, the law of nations had a richer and deeper meaning than Bellia and Clark have postulated. “Law of nations” was sometimes an umbrella term for all international law, including treaties and general principles of domestic law shared by civilized nations. These general principles occasionally supplied rules of decision in constitutional cases. The law of nations was also a source of law for the Supreme Court in interstate cases perceived as analogous to international cases because of the belief that the states retained a large measure of residual sovereignty, especially from the Founding to the Civil War. Finally, the law of nations at the Founding and thereafter was perceived in part as natural law, subject to discovery by empirical study and the systematic analysis of treatise writers. This fact has consequences for how we understand what federal judges were doing when they engaged the historical law of nations in the eighteenth and nineteenth centuries, and for the original meanings of the Supremacy Clause and of Article III “arising under” jurisdiction.

The upshot is that although Bellia and Clark are correct that the law of nations is neither monolithic nor a simple synonym for modern customary international law, the historical interaction between the law of nations—when properly understood—and the U.S. Constitution is too complicated to come away with a pat conclusion about what history teaches us. Bellia and Clark have opened up a Pandora’s box, but their thesis leaves many questions unanswered. In the

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104. See, e.g., *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (dismissing original action on the view that district courts have arising-under jurisdiction over federal common law claims alleging pollution of navigable waters).

following Parts, I will attempt to bring some order to the confusion, starting with the relationship between the law of nations and the judiciary branch of the national government. The basic theme of Part III is to demonstrate how the Framers envisioned a more active and dynamic role for the judiciary in foreign relations than Bellia and Clark have asserted.

### III. THE LAW OF NATIONS AND THE JUDICIARY BRANCH

The law of nations, in all its rich complexity as described above, was the national judiciary's toolbox for resolving sensitive foreign policy disputes that came to it through the Constitution's grants of judicial power and the First Congress's selective implementation of the constitutional grants in the 1789 Judiciary Act. The President, with the advice and consent of two-thirds of the Senate, makes treaties that are "the supreme Law of the Land," state laws notwithstanding.<sup>105</sup> Congress, with the consent of both houses and presentment to the President,<sup>106</sup> makes statutes that are likewise supreme over state laws.

The law of nations was the analogous responsibility of the judiciary branch. Unlike treaties and statutes, however, it was not codified in written form according to a constitutionally prescribed political process of advice-and-consent or bicameralism-and-presentment, but it was instead found by judges (and sometimes juries)<sup>107</sup> and applied to the facts of specific cases. As discussed above, it was also theoretically impossible for a natural-law rule of the law of nations to conflict with state constitutions or laws despite room for diversity as to local customs. So there was no felt need to write into the Supremacy Clause explicit guidance to state judges ordering them to reconcile authoritative federal and state legal texts in favor of the federal, at least as far as the natural-law law of nations was concerned.

In the late eighteenth century, American lawyers, statesmen, and federal courts found the natural-law part of the law of nations primarily in British and European treatises.<sup>108</sup> In the nineteenth century, as the Supreme Court and lower federal

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105. U.S. CONST. art. VI, cl. 2.

106. *Id.* art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States").

107. Professor Ritz writes:

Even the jury, in the eighteenth century, was viewed as collegially involved in the judicial search for "the law." Juries not only found the facts, but they also had the final word as to what the law was. There was no need to "report" these jury determinations on the law since they would not be binding in any other court, nor for that matter in the same court in a different controversy.

WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 30 (Wythe Holt & L.H. LaRue eds., 1989).

108. See Lee, *supra* note 18, at 1063 ("Vattel's authority was so great before the courts that prior to arguments before the federal circuit court in Richmond in 1790, Patrick Henry did not hesitate to send his grandson 60 miles on horseback to look for the work that could permit him to win over the judges.") (quoting Albert de Lapradelle, *Introduction* to EMMERICH DE VATTEL, *THE LAW OF NATIONS*, in 3 *THE CLASSICS OF INTERNATIONAL LAW* at iii, xxxvi (James Brown Scott ed., George D. Gregory & Charles G. Fenwick trans., 1916) (1758)).



courts produced more reasoned written opinions and juries were increasingly constrained to deciding facts not law,<sup>109</sup> federal courts turned to the written manifestations of their own jurisprudence and native treatise-writers like Story and Wheaton to find the law of nations. Lower courts increasingly decided cases by “following law” as declared in the written opinions of the Supreme Court.

In my opinion, this was a departure from the original law-of-nations paradigm of “finding law,” in which the Supreme Court was not so much a superior court as a *primus inter pares* trial court. In the old eighteenth-century model, judges and juries were partners tasked with searching for the right rules in the treatises and applying them to the specific facts of a case to bring the case to a close.<sup>110</sup> The language of Article III and its implementation in the 1789 Judiciary Act reflect an original plan for the Supreme Court to function identically to the lower courts as a trial court, but for bigger and more high-profile cases and with a new appellate jurisdiction subject to congressional regulations and exceptions.<sup>111</sup> Indeed, Article III, by its explicit terms, does not require any federal courts besides the Supreme Court, leaving it up to Congress to “ordain and establish” any “inferior courts . . . from time to time.”<sup>112</sup> In terms of rules of decision, it was a decentral-ized judicial system where all courts were to apply rules to facts. In cases and controversies implicating the natural-law law of nations, the most important sources were the treatise writers. The idea of the appellate court decision as the primary source of rules of decision in future cases was in an embryonic phase.<sup>113</sup> The sweeping success of the campaign led by Chief Justice John Marshall to build the Court’s gravitas and institutional legitimacy and to transform it into a “supreme” institution in a judicial hierarchy has blinded us to the original design for the judicial branch.

In the new nineteenth-century model, the Supreme Court, wielding judicial review and more robust appellate jurisdiction, jettisoned its trial court function and became a “law declaring” institution. The transformation is perfectly captured by Chief Justice John Marshall’s famous assertion in *Marbury v. Madison*: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>114</sup> As a description of the role of the modern Supreme Court, Marshall’s booming declaration is surely correct. But as a description of the Supreme Court’s (and the lower federal courts’) primary role in the original

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109. See RITZ, *supra* note 107, at 30 (“[A]ll eighteenth-century courts were trial courts having a number of judges and juries all mutually engaged in ‘finding’ the true rule of law. In the twentieth century the . . . jury has been excluded from the ‘lawmaking or law-finding process.’”).

110. See *id.* at 27–32.

111. See, e.g., U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.”).

112. *Id.* art. III, § 1, cl. 1.

113. See RITZ, *supra* note 107, at 44 (“In 1789, the principal characteristic of state judiciaries was their *horizontal* arrangement. ‘Superior’ courts as well as ‘inferior’ court[s] were trial courts. The important function of the superior courts was the trial function, not the appellate-review function”).

114. 5 U.S. (1 Cranch) 137, 177 (1803).



constitutional framework, it is subject to doubt. A more accurate statement would be: "It is emphatically the province and duty of the judicial department to find the law and apply it to the facts of cases brought before it." To some extent, this function may require a statement of what the law is to satisfy the litigants and to provide guidance for analogous cases so future judges (and juries) do not have to start from scratch. Even with respect to cases implicating the law of nations where juries were not as relevant, early federal judges did not imagine themselves as makers or systematizers of law-of-nations rules. They decided specific cases and resolved controversies. The exception that proves the rule are judges like James Kent and Joseph Story who were also treatise writers.<sup>115</sup>

In this sense, the law of nations was the original constitutionally authorized federal common law. By this I mean that the law of nations was the designated source from which federal judges (and juries) were to discover and apply rules to the facts of specific cases, analogous to what eighteenth-century state courts were expected to do in the ordinary common law subjects of torts, property, and contracts. Today, we might call this judicial lawmaking, but "law finding" more accurately captures how eighteenth-century federal and state judges would have perceived their roles.

The one possible limitation to the license that the Article III grants of judicial power gives to judges to discover and apply rules from the law of nations is the authority to define and punish crimes against the law of nations.<sup>116</sup> The constitutional power to "define and punish . . . Offenses against the Law of Nations" is explicitly committed to Congress.<sup>117</sup> Moreover, the power to decide (with a jury) that a person has committed a crime unfixed by statute and to take away the person's liberty not only implicates the individual Bill of Rights, but also governmental power of a magnitude that logically requires legislative sanction. Even so, there are indications that the Framers of the Constitution envisioned just such a power, and that it was believed to be particularly robust with respect to crimes on the high seas, against neutrality, and involving foreign diplomats.<sup>118</sup> George Washington, for instance, gave this guidance as part of his Neutrality Proclamation in 1793 during the war between Great Britain and France: "I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the Courts of the United States, violate the law of nations, with respect to the powers at war, or

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115. Kent was a New York state judge and chancellor but was more famously known for his four-volume *Commentaries on American Law*, published between 1826 and 1830, which was the canonical reference on American law of the time. Joseph Story was a justice of the Supreme Court from 1811 to 1845, a professor at Harvard Law School, and also published highly regarded treatises on multiple subjects including the U.S. Constitution, equity jurisprudence, and conflict of laws.

116. *See* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that the federal courts lack common law jurisdiction to hear criminal cases in a case brought against a newspaper for criminal libel against the President and Congress).

117. U.S. CONST. art. I, § 8, cl. 10.

118. *See, e.g.,* *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360) (issuing a grand jury charge based on a violation of neutrality).

any of them.”<sup>119</sup> In *United States v. Ravara*,<sup>120</sup> the first reported federal criminal case, one of the indictments against the defendant for sending threatening letters to the British minister in Philadelphia alleged a violation of the law of nations.<sup>121</sup>

The great impediment to understanding the full scope and nature of the judiciary’s Founding-era authority to find and apply the law of nations is the modern lawyer’s need to characterize the law of nations as federal law or state law. Modern U.S. lawyers, Bellia and Clark included, cannot help but see the potential for a collision between federal and state law. Late eighteenth-century American lawyers and judges did not have as fine-tuned a sense as their modern descendants for conflict between federal and state law. First, as noted earlier, they thought that the two bodies of law both were ordained by natural law and embodied the same general principles, and so their prescriptions would coincide in most cases. Second, they believed that local customs ruled local matters—property, family relations, intra-state contracts, and the maintenance of peace and order—but that these customs were logically confined to their respective regions.<sup>122</sup> Thus, there was not much perceived potential for conflict.

The one important possibility of conflict between the law of nations and state laws that Americans at the Founding were plainly aware of involved the conventional law of nations—that is, treaty provisions codifying norms that were not yet general principles of law. As noted in Part II, this was not viewed as part of the natural-law law of nations, which was the only focus of Blackstone’s and Vattel’s treatises. For example, there was no default law-of-nations rule regarding payment of preexisting debts to creditors between countries at war upon resumption of peace. Accordingly, countries were free to negotiate the law of nations rule they wanted by convention. Article IV of the 1783 Treaty of Peace between the United States and Great Britain provided that “[i]t is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted.”<sup>123</sup> Nevertheless, many states passed laws that conflicted with the treaty obligation, for instance, by allowing payment of debts by state-issued paper currency, not convertible hard

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119. *Proclamation of Neutrality* (April 22, 1793), reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 1745-1799, at 430–31 (John C. Fitzpatrick ed., 1939). It may be that Washington intended “law of nations” in its broadest usage, encompassing the conventional law of nations (treaties, for example) such as the 1783 Treaty of Peace with Great Britain.

120. 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122).

121. See John D. Gordan III, *United States v. Joseph Ravara: “Presumptuous Evidence,” “Too Many Lawyers,” and a Federal Common Law Crime*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 106, 138–41 (Maeva Marcus ed., 1992) (discussing these and other facts alleged in the case against the defendant, Ravara).

122. See, e.g., *Swift v. Tyson*, 41 U.S. 1, 18 (1842) (acknowledging that state law, not general law, applied to “rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character”).

123. Article IV of the Treaty of Peace was a particular target of state nullification by law and jury verdicts. Definitive Treaty of Peace art. IV, U.S.–Gr. Brit., Sept 3, 1783, 8 Stat 80.

currency.<sup>124</sup> In my view, the Supremacy Clause—the only explicit constitutional provision addressed to conflicts between state and federal law—was drafted to provide a basis for challenging precisely these state laws passed to preempt the 1783 Treaty of Peace. By the same token, a rule of the customary law of nations grounded in tacit consent, as opposed to explicit consent by treaty, might preempt state law where a federal court found one to apply. The most likely sphere where this might have occurred was in ambassadorial cases, as I will discuss below.

A careful examination of the grants of judicial power in Article III, Section Two of the Constitution reveals how they were designed to give the newly created federal judiciary power to deploy the law of nations in all four of its manifestations discussed above to mediate international and interstate relations: (1) all international law, including treaties; (2) general principles of domestic law; (3) law of state-state relations as law of federalism; and (4) law of nations as natural law. When the First Congress passed the Judiciary Act of 1789 and created the federal court system, it did not implement all the constitutional grants. But the grants Congress did enable, and the two usages of the phrase “law of nations” in that landmark statute, also illuminate the importance of the law of nations to the role of the judiciary at the Founding.

#### A. THE LAW OF NATIONS GRANTS IN ARTICLE III

Article III provides that the “judicial Power shall extend”<sup>125</sup> to three categories that plainly implicate the law of nations:

- (1) “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;”<sup>126</sup>
- (2) “all Cases affecting Ambassadors, other public Ministers and Consuls;”<sup>127</sup> and
- (3) “to all Cases of admiralty and maritime Jurisdiction.”<sup>128</sup>

Part II discussed the “arising under” subheading with respect to whether “Laws of the United States” includes the law of nations, concluding on balance that it likely did not. The heading also includes treaties. Consequently, it directly authorizes federal courts to hear suits alleging violations of treaty obligations—the conventional law of nations. Additionally, late eighteenth-century treaties of peace, amity, and commerce were succinct and imprecise in their provisions,

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124. See Wythe Holt, *“To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1458 (describing the various ways that state legislatures, judges, and juries sought to frustrate foreign and out-of-state creditors).

125. U.S. CONST. art. III, § 2, cl. 1.

126. *Id.*

127. *Id.*

128. *Id.*

leaving gaps that natural law or customary law of nations could fill.<sup>129</sup> For example, questions arose as early as the Neutrality Controversy of 1793 about the specific obligations owed to treaty partners fighting wars. On the one hand, there was the Treaty of Peace with Great Britain; on the other, there was the Treaty of Alliance with France. The United States was stuck in the middle of seemingly conflicting treaty obligations when the two European powers went to war in 1793. Was a neutral state obligated to prosecute its nationals who voluntarily joined the war against a treaty partner? Did the United States have an affirmative duty to come to France's aid in its war against Britain? The situation was so dire that Secretary of State Thomas Jefferson, at President George Washington's direction, famously wrote a letter to the Supreme Court justices seeking their advice:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the US. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land[.]<sup>130</sup>

Chief Justice John Jay refused to answer Jefferson's questions, giving birth to the "advisory opinion" bar.<sup>131</sup> But he and his fellow federal judges would presumably have answered the questions based on "the construction of our treaties, the laws of nature and nations, and on the laws of the land" had they been presented in actual cases.

The second subheading of Article III, Section 2 extends judicial power to "all Cases affecting ambassadors, other public Ministers and Consuls."<sup>132</sup> The word "affecting" suggests expansive coverage, at least including any cases implicating ambassadorial and consular rights, privileges, and immunities. At the time of the Founding, there were no multilateral treaties governing this subject matter as there are now; nor did bilateral treaties go into detail about diplomatic

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129. See, e.g., Treaty of Amity and Commerce, U.S.–Neth., Oct. 8, 1782, 8 Stat. 32; Treaty of Amity and Commerce, U.S.–Swed., Apr. 3, 1783, 8 Stat. 60; Treaty of Amity and Commerce, U.S.–Prussia, Sept. 10 1785, 8 Stat. 84; Treaty of Peace and Friendship, U.S.–Morocco, Jan. 1787, 8 Stat. 100. The common basic commitments of these treaties were peace and freedom of navigation and entry of goods and persons subject to fees chargeable at the rate obtained by the most favored nation. Although there were additional terms unique to particular treaties, they generally did not address questions that might arise in specific cases, for example, the immunities of ambassadors and their households in the judicial courts of the receiving state.

130. Letter to the Justices of the Supreme Court (July 18, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 520 (John Catanzariti ed., 1995).

131. See Letter of Chief Justice John Jay and Associate Justices to President Washington (Aug. 8, 1783), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488–89 (Henry P. Johnson ed., N.Y., G.P. Putnam's Sons 1891) ("[T]he three departments of the government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to . . .").

132. U.S. CONST. art. III, § 2, cl 2.

rights and immunities.<sup>133</sup> Pertinent rules were found by consulting the law-of-nations treatise. Some rules were believed to be necessary law-of-nations rules, such as the criminal immunity of an ambassador.<sup>134</sup> Other rules, such as the criminal immunity of consuls (as opposed to ambassadors or ministers), were part of the customary law of nations binding on a state only insofar as it had tacitly consented.<sup>135</sup>

The Original Jurisdiction Clause of the Constitution also mentions ambassadorial cases and uses the same phrase as the second subheading: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction."<sup>136</sup> The Supreme Court's original jurisdiction is the only judicial power that the Constitution's plain language *prohibits* Congress from altering. Article III states that "the supreme Court shall have original Jurisdiction"<sup>137</sup> without any specification of congressional power to tamper with the jurisdiction. The Supreme Court's appellate jurisdiction, by contrast, is subject to "such Exceptions, and under such Regulations as the Congress shall make."<sup>138</sup> And the plain language of the Constitution does not require Congress to create any lower federal courts at all. Article III gives Congress the discretion to "ordain and establish" lower courts "from time to time."<sup>139</sup>

Why did the Framers feel it necessary to prohibit Congress from divesting the Supreme Court's original jurisdiction over ambassadorial cases? The explanation is plain enough. At its Founding, the United States was a militarily weak, revolutionary republic. It needed to maintain peace with Great Britain, as well as with France and Spain, the other European powers with possessions on American soil. Equally as important, the U.S. economy was mostly agrarian and required trade and commerce with Europe to sell its produce and lumber and to obtain tools and other goods. Any incidents involving foreign ambassadors in the United States might occasion diplomatic controversies and even war. Thus, it would be best to have any ambassadorial disputes settled directly by the highest court in the land. The exalted forum would show respect for the foreign ambassadors who represented their sovereigns and signal to them how seriously the young United States regarded the matter.<sup>140</sup> The same reasons would support the conclusion that any ruling the Supreme Court would issue, for instance, on ambassadorial immunity, would preempt any relevant state law.

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133. See, e.g., Treaty of Amity and Commerce art. XXV, U.S.–Prussia, *supra* note 128, at 7.

134. See Vattel, *supra* note 18, bk. II, § 80, at 464.

135. See *id.*, bk. I, § 34, at 148.

136. U.S. CONST. art. III, § 2, cl. 2.

137. *Id.*

138. *Id.*

139. *Id.* art. III, § 1.

140. See Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1779 n.58 (2004).

The third in the list of judicial powers plainly implicating the law of nations is “all Cases of admiralty and maritime Jurisdiction.”<sup>141</sup> Because they identify maritime law as one of their three branches of the law of nations, Bellia and Clark acknowledge federal judicial power to decide cases in this field, even when judicial rules of decision preempt state law.<sup>142</sup> It is worth pointing out that there is no Article I grant of power to Congress regarding admiralty and maritime matters—a fact suggestive of judicial primacy in maritime matters, at least according to the original constitutional plan.

Maritime law had a public law sub-branch and a private law sub-branch. The public law branch was the law of war at sea, particularly the law of prize—the rights of a belligerent to take title to captured ships and cargo.<sup>143</sup> Even during the Neutrality Crisis of the late eighteenth century, when the United States was not actually at war, the *in rem* jurisdiction of U.S. federal courts was implicated by French and British naval actions that resulted in ships sailing into ports along the Eastern seaboard. Subsequently, prize cases arose out of the Quasi-War with France, the War of 1812, engagements with the Spanish in the Caribbean, the Mexican-American War, the Civil War, and the Spanish-American War.<sup>144</sup> It was undisputed that U.S. federal courts acting as prize courts applied the law of nations in crafting rules of decision, and that their decisions preempted contrary state judicial decisions or laws according to the Supremacy Clause.<sup>145</sup>

Private maritime law, also known as admiralty—law involving bills of lading, salvage, collision, and crew and maritime worker treatment<sup>146</sup>—was a different kettle of fish, by nature more similar to the law merchant. In fact, the law of maritime contracts and commerce was functionally identical to the law of terrestrial contracts and general commercial law of the *Swift v. Tyson* type. And as application of general law on land grew in the wake of *Swift*, the federal courts also expanded the scope of general maritime law over the decades, to the point that the boundary concept of “navigable waters” came to encompass rivers and the Great Lakes, and many claims with only tenuous connection to navigable waters were brought within the federal courts’ admiralty and maritime jurisdiction.<sup>147</sup> But private maritime law, unlike the law merchant, did not have an *Erie* denouement. Rather, the Supreme Court in *Southern Pacific Co. v. Jensen* decreed that general maritime law was federal law, preempting state law.<sup>148</sup> That decision has

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141. U.S. CONST. art. III, § 2, cl. 1.

142. See BELLIA & CLARK, *supra* note 1, at 114–15.

143. *Id.* at 113.

144. See Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in PRESIDENTIAL POWER STORIES 53, 88 (Christopher S. Schroeder & Curtis Bradley eds., 2009); David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

145. See U.S. CONST. art. VI, cl. 2; Lee & Ramsey, *supra* note 144, at 89.

146. See generally GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* (1957).

147. BELLIA & CLARK, *supra* note 1, at 124–28 (detailing the Supreme Court’s gradual expansion of the scope of admiralty jurisdiction).

148. 244 U.S. 205 (1917).



drawn much criticism (including from Professor Clark, in a prior article),<sup>149</sup> but Bellia and Clark's book does not take a normative position on whether *Erie*'s logic should be extended to the private maritime context.<sup>150</sup> They invoke the contrasting outcomes as an illustration of their point that there is no single formula for the status of the law of nations as federal law.

In addition to the three categories of "Cases," Article III, Section 2 extends the federal judicial power to six categories of "Controversies."<sup>151</sup> One of these—controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"—plainly implicates the law of nations and foreign relations.<sup>152</sup> The subheading, commonly called the Alienage Clause, includes possible controversies between a U.S. state and a foreign state, between a state citizen and a foreign state, and between a U.S. state and a foreign citizen or subject.<sup>153</sup> The Original Jurisdiction Clause, with its reference to cases "in which a State shall be Party," plausibly applies to all three configurations, assuming that the phrase "State shall be Party" includes a U.S. state or a foreign state.<sup>154</sup> As I have explained elsewhere, this part of the Original Jurisdiction Clause was designed to give the Supreme Court the function of a "quasi-international tribunal," adjudicating disputes both between American and foreign states and between one U.S. State and another.<sup>155</sup> Bellia and Clark do not discuss the Alienage Clause, but because it implicates state-state relations, they would presumably agree that any rule of decision handed down by the Supreme Court under its State-as-party original jurisdiction would preempt state law.

If, as I argued in Part II, the law of nations is implicated in interstate as well as international controversies,<sup>156</sup> then the list of relevant judicial power grants in Article III expands by four: controversies (1) "between two or more states"; (2) "between a State and Citizens of another State"; (3) "between Citizens of different States"; and (4) "between Citizens of the same State claiming Lands under Grants of different States."<sup>157</sup> Of course, *Erie* blocked the use of any form of law of nations in one set of controversies: those "between Citizens of different

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149. See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994) (Stevens, J., concurring in part) ("In my view, *Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* would be in a case under the Due Process Clause." (internal citation omitted)); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1347–50 (1996); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 291–305 (1999).

150. See BELLIA & CLARK, *supra* note 1, at 131 ("For present purposes, whether or not *Jensen* and its progeny have correctly interpreted Article III to incorporate general maritime law as federal law is not essential to resolving larger questions relating to the law of nations and the Constitution.").

151. U.S. CONST. art. III, § 2, cl. 1.

152. *Id.*

153. *Id.*

154. *Id.* art. III, § 2, cl. 2.

155. See Lee, *supra* note 140.

156. See *supra* notes 56–57 and accompanying text.

157. U.S. CONST. art. III, § 2, cl. 1.



States.”<sup>158</sup> The *Erie* Court held that with respect to citizen-on-citizen diversity cases, federal courts must use applicable state law to decide cases, not the general law merchant.<sup>159</sup> But it does not follow that the law of nations, whether general law or federal law, cannot be applied to the other three Article III enumerations of interstate controversies, or to the citizen-foreign citizen or subject controversies. The easiest case to make is for “Controversies between two or more states.”<sup>160</sup> This judicial power was intended to provide a method of adjudication for border disputes or other disagreements between states. Such disputes are analogous to border or territorial disputes among nation-states, where the law of state-state relations would apply.<sup>161</sup> And the fact that states are adverse parties logically compels the conclusion that state law cannot be used, because it would favor one side or the other.<sup>162</sup> Nor do *Erie*’s concerns about deferring to local governance apply.

The question, then, is whether the remaining three categories of controversies are more similar to citizen-citizen diversity and in *Erie*’s orbit, or more similar to state-to-state controversies where the law of nations should apply, even if state law says otherwise. Controversies between citizens of the same state claiming land grants from different states seems to call for the application of a federal choice-of-law principle to break the impasse. One would think that a citizen-foreign citizen/subject controversy is similar to *Erie*. But there is surely greater reason to refrain from applying state law when one of the litigants is a foreign merchant. This must have been particularly true in the late 1780s, when the United States was a weak military power and in dire need of commerce with the European powers. Indeed, more generally speaking, it is not clear that *Swift v. Tyson* was wrong as a matter of Article III’s original meaning given the felt need in the late eighteenth century to foster interstate trade and commerce.

When one adds the four interstate enumerations of judicial power to the four strictly international enumerations of judicial power in Article III, Section 2, *eight* of the nine constitutional specifications of judicial power implicate the law of nations as properly and fully understood. The only heading that does not is “Controversies to which the United States shall be a Party.”<sup>163</sup> Federal courts scholars know very little for sure about this specific constitutional grant. It appears to have been made for the purpose of affording the United States a federal forum to sue individuals for civil liabilities to the government, such as breaches

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158. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that state law, regardless of whether in the form of a statute or a judicial decision, supplies the rule of decision in lawsuits brought in federal court on the basis of citizen-citizen diversity).

159. See *id.*

160. U.S. CONST. art. III, § 2, cl. 1.

161. See Lee, *supra* note 18, at 1067 (“In a fascinating case of historical feedback, the U.S. Supreme Court’s water rights jurisprudence, refined over time in the crucible of sensitive interstate border disputes, now constitutes a primary source of international law in transnational water rights cases.”).

162. See Lee, *supra* note 140, at 1782 & n.72.

163. U.S. CONST. art. III, § 2, cl. 1.

of contracts with the U.S. government.<sup>164</sup> Its principal application would have been to citizens of the United States. However, it is plausible that suits by the U. S. government against foreign merchants doing business in the United States were also contemplated. If so, then all nine of Article III's grants of judicial power implicate the law of nations in some sense.

This remarkable truth of the language of Article III, Section 2 is obscured today because the three heads of judicial power most commonly invoked are cases arising under the Constitution or under the laws of the United States, or citizen-citizen diversity controversies where state law provides the rule of decision after *Erie*. The prevalence of the constitutional and statutory parts of arising-under jurisdiction today underscore a startling discontinuity. Neither flavor of arising-under jurisdiction was provided for in the Judiciary Act of 1789—the First Congress's enactment that established the federal court system. Indeed, a lasting general federal-question statute was not enacted until 1875.<sup>165</sup> The only part of the 1789 Act that arguably invokes arising-under jurisdiction is the so-called Alien Tort Statute in section 9 of the Act that mentions treaties and the law of nations, not statutes or the Constitution.<sup>166</sup> We turn, then, to the 1789 Judiciary Act, which only selectively implemented the nine grants of judicial power enumerated in Article III.

#### B. REFERENCES TO THE LAW OF NATIONS IN THE JUDICIARY ACT OF 1789

The phrase “law of nations” is used two times in the Judiciary Act of 1789. Section 9, which details the jurisdiction of the newly created district courts, provides that the district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>167</sup> This is the famous Alien Tort Statute (ATS).<sup>168</sup> Section 13, which sets forth the original and appellate jurisdiction of the U.S. Supreme Court,

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164. The Judiciary Act of 1789 gave federal district courts “cognizance,” concurrent with state courts and federal circuit courts, “of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. The circuit courts had jurisdiction concurrent with the state courts “of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners.” *Id.* at § 11, 1 Stat. 73, 78.

165. Act of March 3, 1875 § 1, 18 Stat. 470 (conferring on federal circuit courts—the principal trial courts of the time—concurrent jurisdiction of “all suits of a civil nature, at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority” subject to a \$500 amount-in-controversy threshold). The Federalist Party, after losing both houses of Congress and the Presidency, had passed a general federal-question statute in 1801, but it was repealed the following year. Act of Feb. 13, 1801 § 11, 2 Stat. 89, 92, *repealed by* Act of March 8, 1802, 2 Stat. 132.

166. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

167. *Id.* (codified as amended at 28 U.S.C. § 1350 (2012)).

168. In 1980, the U.S. Court of Appeals for the Second Circuit held that an alien could sue another alien present in the United States under the ATS for violations of international human rights law that occurred in a foreign country. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

provides that it “shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations.”<sup>169</sup> This reference to the law of nations in the 1789 Judiciary Act is hardly ever mentioned, in contrast to the extensive commentary on the ATS.

Section 13 is plainly implementing the Article III, Section 2 grant of judicial power over all cases “affecting Ambassadors, public Ministers, and Consuls.”<sup>170</sup> The statute does not include suits against consuls, presumably because consuls were quasi-diplomatic agents usually located in ports or commercial cities, not the nation’s capital where ambassadors or ministers were received and confined by the host sovereign.<sup>171</sup> The statute does, however, include suits against “domestics or domestic servants” who are not mentioned in the constitutional grant.<sup>172</sup> This was done presumably on the belief that any suits against domestic servants of an ambassador fall within the constitutional grant of cases “affecting” ambassadors or other public ministers. It is puzzling why explicit reference was made to the law of nations, because the Supreme Court would likely have consulted law-of-nations treatises to determine the scope of any pleaded ambassadorial or ministerial immunities in any event. The most plausible explanation is that the First Congress sought to signal that the Supreme Court should be as protective as possible of the prerogatives of foreign ambassadors, going so far as to extend immunity to domestic servants, to avoid offense to their sponsoring states.

This statutory reference to the “law of nations” suggests an interesting counterfactual: What if Congress had passed a statute stripping ambassadorial immunity in the Supreme Court where the law of nations would plainly grant it? I think it beyond doubt that Bellia and Clark would assert that the Court would be bound by that act of Congress, even though the Court could contravene any applicable state laws.<sup>173</sup> I would disagree. If the President and Senate ratified a treaty, then that would bind the Court as the conventional law of nations. And perhaps the President could do the same, because the Constitution directs that “he shall receive Ambassadors and other public Ministers.”<sup>174</sup> Congress, however, has no explicit constitutional authority over ambassadors under Article I, by contrast to the Constitution’s references to ambassadors in Article II and Article III. Moreover, if Congress could force the Supreme Court to hear original actions against foreign ambassadors despite prohibition of such suits under general principles of public law, then it would arguably infringe upon the Court’s constitutionally self-executing original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and

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169. § 13, 1 Stat. 80.

170. U.S. CONST. art. III, § 2, cl. 2.

171. See VATTEL, *supra* note 18, bk. I, § 34, at 147–48 (describing the commercial roles of consuls and contrasting them with ambassadors).

172. § 13, 1 Stat. 80.

173. BELLIA & CLARK, *supra* note 1, at 234 (noting the consensus among scholars that U.S. courts are bound by acts of Congress even if they conflict with customary international law).

174. U.S. CONST. art. II, § 3.

Consuls.”<sup>175</sup> And *Marbury v. Madison* famously held that Congress cannot infringe upon the Supreme Court’s constitutional original jurisdiction.<sup>176</sup>

With respect to the much more famous law-of-nations reference in the ATS, the Supreme Court held in *Sosa v. Alvarez-Machain* that federal courts could entertain suits brought by aliens against other aliens in foreign countries alleging violations of customary norms of international law that were “specific, universal, and obligatory.”<sup>177</sup> The Court adopted this holding based on its conclusion that the ATS was not intended to be “stillborn” when enacted, but was instead meant to allow suits based on a small group of paradigmatic law-of-nations violations, namely, piracy, ambassadorial infringements, and violation of something called safe conducts.<sup>178</sup> An implication of *Sosa*’s holding is that a case arising under customary international law is one that satisfies Article III “arising under” jurisdiction. That implication is at odds with Bellia and Clark’s claims about the limits on the historical law of nations that count as federal law.

I have argued repeatedly that the reference to “the law of nations or a treaty of the United States” in the ATS is not an invocation of substantive international law.<sup>179</sup>

[T]he legal norms the First Congress had in mind when enacting the ATS were not protean international law norms, but rather the domestic law of tort, understood as a noncontract injury to the person or property of the plaintiff. The words ‘in violation of the law of nations or a treaty of the United States’ were necessary to specify which aliens could sue, not to specify the body of law that originated the claim. Put another way, the phrase was intended to narrow the set of local tort law claims actionable under the statute. If, for instance, an *enemy* alien suffered a personal injury or was deprived of property, the harm would not usually constitute an actionable tort ‘in violation of the law of nations or a treaty’ because international law generally permitted the wounding of enemy soldiers and the taking of enemy property. Accordingly, an enemy alien could not bring a civil action in U.S. district court under the ATS. But if a *friendly* or *neutral* alien, such as a Dutch or British merchant in 1789, were to suffer such injury, he could sue under the ATS, even if the amount in controversy was below the \$500 threshold required under the 1789 Act for general alienage diversity jurisdiction. Most alien tort claims then were likely below that threshold.<sup>180</sup>

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175. *Id.* art. III, § 2, cl. 1.

176. 5 U.S. (1 Cranch) 137, 174 (1803) (rejecting Congress’s power to enlarge the Supreme Court’s original jurisdiction as contrary to the plain language of the Article III Original Jurisdiction Clause).

177. 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

178. *See id.* at 714–15.

179. *See* Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1652 & n.34 (2014) [hereinafter Lee, *Three Lives*]; Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 838 (2006).

180. Lee, *Three Lives*, *supra* note 179, at 1652 (footnotes omitted); *see* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (authorizing circuit court jurisdiction “of all suits of a civil nature at common law or

I believe, accordingly, that the ATS was enacted to provide damages in federal court for aliens who suffered noncontract injury to person or property for which the United States would bear sovereign responsibility under the law of nations or a ratified treaty. If that is right, then the argument could be made that the ATS itself provides the statute under which a suit arises similar to the Foreign Sovereign Immunities Act, which is also a jurisdictional statute implicating sovereign responsibility.<sup>181</sup>

One other provision of the first Judiciary Act, mentioned in passing in the Introduction, requires discussion. Section 34 is the famous Rules of Decision Act, which provides “[t]hat the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”<sup>182</sup> The provision has been an enigma for more than two centuries. Charles Warren argued that “laws of the several states” included state judicial decisions based on their explicit inclusion in the original Senate Bill version of the Judiciary Act.<sup>183</sup> Wilfred Ritz, another prominent early American courts scholar, has asserted that “laws of the several states” meant general law of all the American states, as opposed to English law, in part because there was no widespread system of state court decision reporting in 1789 or in the then-foreseeable future.<sup>184</sup> He also reasoned that the usages of the time would have entailed the words “laws of the respective states” if it were intended to refer to the laws of the individual states.<sup>185</sup> And then there is the “in cases where they apply” coda, which can be read as broadly or as narrowly as one may prefer. Finally, the inclusion of “treaties” suggests that treaty provisions were directly enforceable as rules of decision in civil actions in federal court, is in tension with the modern doctrine’s rejection of the presumption that treaties are “self-executing” in U.S. courts absent an implementing statute.<sup>186</sup>

The upshot is that even if Section 34 provides reasonable support for the holding in *Erie* with respect to the constitutional grant of judicial power in citizen-citizen controversies, it does not follow that it requires state law where it diverges

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in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars . . . and an alien is a party”); § 12, 1 Stat. 79 (authorizing removal from state court to federal circuit court of the same).

181. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 489 (1983).

182. Judiciary Act of 1789, § 34, 1 Stat. 92. The statute is virtually unchanged since 1789 and now provides: “The laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.” *Id.* (codified 28 U.S.C. § 1652 (2012)).

183. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 88 (1923).

184. *See* RITZ, *supra* note 107, at 46–52.

185. *See id.* at 81–87.

186. *See* *Medellin v. Texas*, 552 U.S. 491, 504–19 (2008) (construing Article 94 of the United Nations Charter regarding compliance with International Court of Justice decisions as non-self-executing, therefore not binding as U.S. law or actionable in federal courts absent congressional enactment of an implementing statute).

from the law of nations with respect to cases or controversies in federal court pursuant to any other of the nine Article III grants.

In *Swift v. Tyson*, Justice Story asserted that Section 34 authorized federal judges to apply general law in an interstate commercial case, and that state statutes and local usages and customs would apply with respect to intrastate matters—such as local contracts, torts, and property-related disputes.<sup>187</sup> In subsequent decades, however, federal courts applied general law in increasingly more contexts, spurred by the growth of railroads, which spawned related contract, tort, and property suits with a plausible claim to general law under *Swift* by virtue of the railroads' interstate span.<sup>188</sup> Nearly a century later, the Court's 1938 decision in *Erie Railroad Co. v. Tompkins* jettisoned the insatiably expanding general law regime under *Swift*.<sup>189</sup> In his opinion for the Court, Justice Louis Brandeis, relying on Warren's research, asserted that the federal courts had acted in contravention of the Rules of Decision Act, to the point of acting unconstitutionally, by applying general commercial law in intrastate contexts where the states had police power.<sup>190</sup> The Court directed the lower courts to apply state law to citizen-citizen diversity cases going forward.<sup>191</sup> But *Erie* did not address or seek to limit the use of general law or any other category of the law of nations pursuant to other Article III grants of power. Indeed, as noted above, a similar regime to *Swift* survived the perturbations of *Erie* in the law of the sea.

In sum, examination of Article III of the Constitution and the Judiciary Act of 1789 suggests that the Americans at the Founding who adopted and implemented the Constitution intended the new federal courts to play an active and energetic role in the nation's foreign policy. In fact, the constitutional commitment of ambassadorial and state-as-party cases to the Supreme Court's original jurisdiction supports the conclusion that the Court, and not the political branches, was to play the lead role in resolving suits between states and against foreign ambassadors. Bellia and Clark's identification of state-state relations as a key component of the law of nations is a helpful start, but they do not examine in detail its interaction with the enumeration of judicial powers in Article III. That leads them to underestimate the judiciary's role in foreign relations under the original constitutional plan.

Any doubt that the judiciary was originally to be as important a player in foreign relations as Congress and the President dissolves upon considering the initial Chief Justice appointments to the U.S. Supreme Court. The first Chief Justice nominated by President Washington and confirmed by the Senate was John Jay, who had negotiated the 1783 Treaty of Peace, served as Minister of Foreign Affairs under the Articles of Confederation, and took a leave of absence from the Court to negotiate the follow-on peace treaty with Great Britain that bears his

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187. See 41 U.S. (16 Pet.) 1, 16 (1842).

188. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938).

189. *Id.*

190. *Id.* at 78.

191. *Id.* at 80.



name.<sup>192</sup> The man Washington nominated as Jay's successor, John Rutledge, did not win senatorial advice and consent because he publicly attacked the 1794 treaty Jay had negotiated.<sup>193</sup> Washington's successor, President John Adams, sent Rutledge's replacement, Chief Justice Oliver Ellsworth, to France to negotiate a peace treaty to end the Quasi-War in 1799.<sup>194</sup> Adams then replaced Ellsworth with his Secretary of State, John Marshall. This pattern of appointments by the Founding group shows that they intended the Supreme Court to be a central organ for the conduct of U.S. foreign policy.<sup>195</sup>

#### IV. THE LAW OF NATIONS AND SOVEREIGNTY

Part III demonstrated the extent to which a careful reading of Article III and the Judiciary Act of 1789 is inconsistent with Bellia and Clark's account of judicial passivity and deference to the political branches in foreign relations. What animates their account is the sense that the original constitutional plan did not envision that federal courts could entertain customary international law claims from Americans or foreigners who alleged that a foreign sovereign had violated their rights, or from Americans that the state or federal governments had violated theirs without explicit congressional authorization. Why not? Because, Bellia and Clark assert, the Constitution gives exclusive foreign relations powers to the political branches and so the courts must respect the traditional law of state-state relations absent guidance from those branches.<sup>196</sup> Of course, one could rejoin that the law of state-state relations has evolved in the past two centuries to the point where it now recognizes certain individual human rights claims against their own states.

In this Part, however, I want to suggest that Bellia and Clark may be right about their conclusion that an understanding of original history leads one to believe that federal courts should not entertain such individual human rights claims. But I would like to ground this conclusion not in the law of nations, but rather in the concept of sovereignty as understood by Americans at the Founding. Sovereignty played a very important role in the Founding—Americans fought a war of revolution for it. And I want to suggest that they had a particular vision of sovereignty articulated eloquently by Vattel, whose law-of-nations treatise was so favored by the Founding generation.

Vattel had a different normative project from Grotius. Grotius's opus was the pacifistic fever dream of a devout but tolerant theologian trapped in a time of forever war among Christian princes. He sought to show that beneath the surface of

192. See WALTER STAHR, JOHN JAY: FOUNDING FATHER 145–74, 197–222, 313–38 (2005).

193. See MATTHEW P. HARRINGTON, JAY AND ELLSWORTH, THE FIRST COURTS: JUSTICES, RULINGS, AND LEGACY 44–45 (2008).

194. See WILLIAM GARROTT BROWN, THE LIFE OF OLIVER ELLSWORTH 280–310 (1905).

195. See MARTIN S. FLAHERTY, THE SUPREME COURT AND FOREIGN AFFAIRS (forthcoming 2019) (developing the modern-day implications of this historical truth).

196. See BELLIA & CLARK, *supra* note 1, at 75 (“U.S. courts must respect the rights of recognized foreign nations under the law of state-state relations absent contrary direction from the political branches.”).



constant warfare and reciprocal distrust among Christian sects, there was a rich connective tissue among all the Christian nations. He had enough experience and knowledge of the world to know that he could not end warfare—the law of war he systematized was extremely permissive of war by modern standards. But his vision of an end to Christian internecine warfare and the dawn of a European peace was realized in the Peace of Westphalia.

Vattel's project was different and more focused on individual states, not a world order. It was the promotion and protection of new democratic republics in a world populated by powerful autocratic monarchies. Vattel was the citizen of a Swiss city-state subject to the kings of Prussia, wedged amongst a cluster of powerful monarchies with overlapping sovereignty claims.<sup>197</sup> His primary mechanism for achieving the project was an innovative theory of sovereignty—Vattel's sovereignty.<sup>198</sup>

Vattel's sovereignty had two key elements. The first was sovereign equality: every sovereign state, no matter how small or how new, is the equal of any other. Vattel brought the point home with a powerful metaphor: "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."<sup>199</sup> One need only consider the *mélange* of kingdoms, principalities, empires, and cities that participated in the negotiation and ratification of the treaties that brought about the Peace of Westphalia to see how innovative Vattel was in postulating sovereign equality. As a practical matter, sovereign equality operated in favor of new and smaller republics carved out of more powerful monarchies.

The second element of Vattel's sovereignty was a corollary to sovereign equality: no sovereign state had the right to intervene in another sovereign's internal affairs. Indeed, a norm of domestic non-intervention was necessary to make sovereign equality meaningful.

A republican state in which a foreign sovereign decides the domestic scope of individual peacetime rights and when to go to war would not protect the interests of its citizens. Without a norm of non-intervention, the republic might become form without substance. At the same time, a facially neutral norm of non-intervention would protect republics by reassuring monarchies fearing republican influence in their domestic realms.<sup>200</sup>

This normative vision of sovereignty, in my opinion, captured the sentiment of the American Revolutionaries and was one reason why Vattel's book was so

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197. See VATTEL, *supra* note 18, at xii-xiii (describing Vattel's life and career).

198. See generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (providing an analysis of Vattel's sovereignty).

199. VATTEL, *supra* note 18, intro., § 18, at 75.

200. Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 L. & CONTEMP. PROBS. 147, 152 (2004).

popular among the Founders.<sup>201</sup> They had just fought a revolution against a powerful mother country that still possessed the greatest navy in the world, vast territories north of them, and forts and garrisons to the west. The American armies and navy had disbanded with the peace, and there was no prospect of a speedy recall or rearmament. Sovereign equality and a norm of non-intervention were exactly what the United States needed as a militarily weak, revolutionary republic. This vision of sovereignty, I believe, was hard-wired into the American constitutional DNA and plainly influenced the early U.S. views on the law of state-state relations that Bellia and Clark have ably documented. This genetic disposition compels a hostility to externally imposed substantive norms of conduct, even if they are pitched as customary international law.

Vattel was extremely aggressive in his vision of the sovereign right to be left alone:

It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious.<sup>202</sup>

His view of the extent to which a sovereign can do what it pleases to its own people was boundless: “If he loads his subjects with taxes, and if he treats them with severity, the nation alone is concerned in the business; and no other is called upon to oblige him to amend his conduct.”<sup>203</sup> Sovereign autonomy even extended to what might be viewed as uncivilized conduct:

The Spaniards violated all rules, when they set themselves up as judges of the Inca [ruler] Athualpa. If that prince had violated the law of nations with respect to [the Spanish], they would have had a right to punish him. But they accused him of having put some of his subjects to death, of having had several wives, [etc].—things, for which he was not at all accountable to them; and, to fill up the measure of their extravagant injustice, they condemned him by the laws of Spain.<sup>204</sup>

Many in the United States at the Founding engaged in a practice that was similarly viewed as uncivilized. Slavery, famously rejected in England by the estimable Lord Mansfield in 1772,<sup>205</sup> was an essential part of the original U.S. constitutional bargain, as evidenced by a regrettable provision in Article I of the

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201. Additional possible reasons for the popularity of Vattel’s treatise among American readers were its accessibility, relative compactness, and readability. It was also written in French, which was easier to read than Grotius’ Latin, which was sprinkled with copious and sometimes obscure Latin and Greek citations.

202. VATTEL, *supra* note 18, bk. II, § 54, at 289.

203. *Id.*, bk. II, § 55, at 290.

204. *Id.*

205. *See* *Somerset v. Stewart* (1772) 98 Eng. Rep. 499 (KB).

Constitution foreclosing the prohibition of the slave trade until 1808.<sup>206</sup> It is for this reason that it is hard for me to imagine that the original adopters of the U.S. Constitution would have contemplated that the federal courts would be open to hear claims based on violation of customary law-of-nations norms. But it was about politics, not law as Bellia and Clark argue.<sup>207</sup>

#### CONCLUSION

Consider two questions. First, if every other country in the world abolished the death penalty because it felt legally obligated to do so, must the United States outlaw the death penalty, absent its consent to a treaty banning it?<sup>208</sup> Second, if a ruthless dictator in a faraway foreign country uses extrajudicial killings to silence domestic political opponents—a violation of customary international law—do (and should) the non-U.S. citizen family members of victims have the right to sue the dictator for money damages in a U.S. federal district court?

These two questions regarding the respect U.S. courts owe to customary international law have loomed large in U.S. foreign relations law scholarship since Jimmy Carter was President. The United States stopped joining multilateral human rights treaties under President Dwight Eisenhower, in large part because of fears among members of the political branches that the treaties might be used to advance the civil rights claims of black persons in the United States.<sup>209</sup> Consequently, customary international law became the only potential path for enforcing international human rights law against the United States and against foreign violators in U.S. courts. If this customary international law is federal law, then it is binding on the states. Many U.S. international law and foreign relations law scholars, sympathetic to international human rights law, would answer both questions in the affirmative, claiming support for their view in original meanings and historical practice.<sup>210</sup> Bellia and Clark's book seeks to rebut these scholars' claims as a matter of original meaning. Bellia and Clark assert that not all historical law of nations was federal law, and that the one branch that was—the law of

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206. U.S. CONST. art. I, § 9, cl. 1 ("The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.").

207. Of course, the ratification of the Thirteenth Amendment in 1865 made slavery unconstitutional. See U.S. CONST. amend. XIII.

208. And if the United States did join a treaty banning the death penalty, despite the U.S. Supreme Court's decisions interpreting the Eighth Amendment to permit the U.S. states to use it, would the treaty's prohibition take precedence? That was the question in *Missouri v. Holland*, 252 U.S. 416 (1920), which was subsequently dodged in *Bond v. United States*, 564 U.S. 211 (2011).

209. See generally DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* (2016).

210. See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); Koh, *supra* note 32, at 1826–27.

state-state relations—compels judicial restraint in enforcing rights that would violate foreign and U.S. sovereignty.<sup>211</sup>

This Article has endeavored to show how the law of nations interacted with the Constitution at the time of the Founding and the importance of the judiciary branch in finding and using the law of nations to mediate the country's international relations. The Americans who adopted the Constitution were keenly aware of their place in the world as a militarily weak new state in need of peace and trade with the European powers for survival, and thus eager to comply with the law of nations—the intramural rules of the European world order. They recognized that newly created federal courts could play an important role in advancing the new nation's international acceptance and survival by judicious deployment of the law of nations as an instrument of U.S. foreign policy, which is why eight of the nine constitutional grants of judicial power in Article III implicated the law of nations. The law of nations was the original federal common law. At the same time, a strong respect for sovereign equality and autonomy borne of revolution inculcated a strong norm of non-intervention in the acts of foreign sovereigns toward Americans or their own citizens.

What are we to take away from this Article's foray into the history, which diverges from Bellia and Clark's prescriptions? For one, we can say that the original Constitution envisioned a far more robust role for the judicial branch in foreign affairs than broadly assumed today. But federal judges today lack the foreign relations experience of their ancestors, and the federal courts as an institution have a diminished foreign affairs function. It does not seem reasonable to go back to the past. We should acknowledge, however, that arguments for executive deference, or for applying the political question doctrine or other doctrines to enable judicial abstention in cases implicating sensitive foreign relations issues, are contrary to—not consistent with—original meanings, the plain language of Article III of the Constitution, and early U.S. history.

A second finding is that looking to the law of nations to interpret the U.S. Constitution was uncontroversial and was in fact part of the original design at the Founding and in the nation's early period. But it is not so easy to say that doing so is necessary or even prudent today, given the long intervening history of Supreme Court decisions and historical practice supplying homemade norms and rules to which we can now turn. Again, just because it was done one way at the Founding does not mean it is the best way to do it today. Indeed, nowhere does the knock against originalism as a technique of constitutional interpretation seem as persuasive as when it involves the law of nations, given the dramatic changes in the United States' standing in the world and how lawyers conceive of law and the law of nations since the Founding. The irony, then, is that knowing the history better should cause us to be more reluctant to deploy it without translation to modern contexts.

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211. See BELLIA & CLARK, *supra* note 1, at 270 (“[T]he Court has continued to require courts and states to uphold the uncoded rights of recognized foreign sovereigns derived from the law of state-state relations (like head of state immunity), and to refrain from pursuing redress against foreign nations for their transgressions in the absence of express authorization from the political branches to do so.”).